

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD BENIGNO, JR.	:	CIVIL ACTION
	:	
v.	:	
	:	No. 01-CV-2158
THOMAS F. FLATLEY, et al.	:	

M E M O R A N D U M

Ludwig, J.

January 29, 2002

Plaintiff Edward Benigno, Jr. moves to “dismiss/strike” the counterclaims of defendants Thomas F. Flatley, American Financial Enterprise, Inc., and K Cabo, Inc. for breach of contract and fraud under Fed. R. Civ. P. 12(b)(6) and 12(f).¹ Jurisdiction is diversity, 28 U.S.C. § 1332; Pennsylvania law governs the substantive issues. The motion is ruled on as follows.

Count I: Breach of Contract

a. Motion to dismiss – denied. A defendant may plead in the alternative.² Fed. R. Civ. P. 8(e)(2) (“A party may ... state as many separate claims or defenses as the party has regardless of consistency....”); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1257 (2d ed. 1990) (“[T]he pleader may find it necessary to demand relief

¹Under Rule 12(b)(6), the factual allegations of a claim are accepted as true, and all reasonable inferences are drawn in the light most favorable to non-movant, and dismissal is only appropriate if it is certain that no relief could be granted to non-movant under any set of facts which could be proven. General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 325 (3d. Cir. 2001) (deciding a motion under Rule 12(b)(6) to dismiss a counterclaim). Rule 12(f): “the court may order stricken from any pleading any ... redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).

²The counterclaim alleges that plaintiff did not have legal possession of the restaurant and bar, although defendants’ answer denies having “knowledge or information sufficient to form to belief as the truth [sic] of this averment.” Defendants’ Counterclaim at 32; Defendants’ Answer at 2.

in the alternative when he is uncertain about the factual background or legal bases for his right to recovery.”). Moreover, a defendant need not establish a “nexus” between the legal wrong alleged and the relief sought. Id. at § 1255 (“The sufficiency of a pleading is tested by the statement of the claim and the demand for judgment is not considered part of the claim.”). Furthermore, since copies of the “master agreement” and “letter of intent” were exhibits to the complaint, their attachment to the counterclaim is unnecessary.

b. Motion to strike allegations of plaintiff’s “legal incapacity” to serve as general counsel and failure to act with reasonable professional competence – denied. These allegations are sufficiently pleaded in defendants’ breach of contract counterclaim.³

c. Motion to strike request for judgment in favor of defendants Thomas F. Flatley and K Cabo, Inc. – denied. While the heading of the breach of contract counterclaim refers only to defendant AFE,⁴ this is preceded by the heading, “Counterclaim by all defendants against plaintiff,” and by a listing of “Thomas F. Flatley, K-Cabo, Inc. and AFE” as “Counterclaim-Plaintiffs.” Defendants’ Counterclaim at 31. All three defendants are named in the request for judgment on the breach of contract counterclaim. Id. at 33.

Count II: Fraud

a. Motion to dismiss – denied. The counterclaim satisfies the heightened pleading requirements of Fed. R. Civ. P. 9(b) (“[A]ll averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”). A claimant must inject “precision and some measure of substantiation into [his] allegations of fraud.” Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir.

³Some of the breach of contract allegations are set forth in defendants’ answer and affirmative defenses. “Counterclaim-Plaintiffs, by this reference, incorporate all of the responses contained in the forgoing [sic] answer and all of the allegations made in the foregoing affirmative defenses.” Defendants’ Counterclaim at 32.

⁴The heading: “Action by AFE for breach of contract”

1984). That standard is met here.

Both Counts

a. Motion to strike claim for compensatory damages – denied. While it is perhaps inartful to say that damages in a jury trial are “determined by the Court,” the nature of the proceeding and the functions of the court and jury are beyond dispute. This objection, while perhaps well taken literally, serves little, if any, useful purpose.⁵

b. Motion to strike claim for punitive damages – granted in part and denied in part. Under Pennsylvania Law, punitive damages are not awardable for breach of contract, Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958, 968 (3d Cir. 1988), but may be recovered for fraud, Hess v. Hess, 580 A.2d 357, 359 (Pa.Super. 1990) (quoting Rizzo v. Haines, 520 Pa. 484, 506, 555 A.2d 58, 69 (1989)).⁶

c. Motion to strike claim for attorney’s fees – granted. There is no cognizable basis on which this claim may proceed.

Edmund V. Ludwig, J.

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⁵“Motions to strike matters from pleadings, pursuant to...Rule...12(f), are disfavored by the courts and should not be granted, even in cases where averments complained of are literally within provisions of federal rule providing for striking of redundant, immaterial, impertinent or scandalous matter, in absence of demonstration that allegations attacked have no possible relation to controversy and may prejudice other party.” Wright v. Philadelphia Gas Works, No. CIV.A.01-2655, 2001 WL 1169108, at *2 (E.D.Pa Oct. 2, 2001); See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1382 (2d ed. 1990) (reiterating this standard and noting that “motions to strike on these grounds are not favored, often being considered ‘time wasters’”).

⁶Defendants’ request to strike plaintiff’s claim for punitive damages and attorney’s fees is not properly asserted in a brief.

v.
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No. 01-CV-2158

ORDER

AND NOW, this 29th day of January, 2002, plaintiff Edward Benigno, Jr.'s motion to "dismiss/strike" defendants' counterclaims is ruled on as follows:

1. Motion to dismiss Count I (Breach of Contract) – denied.
2. Motion to strike allegations of plaintiff's "legal incapacity" – denied.
3. Motion to strike request for judgment in favor of defendants Thomas F. Flatley and K Cabo, Inc. – denied.
4. Motion to dismiss Count II (fraud) – denied.
5. Motion to strike claim for compensatory damages – denied.
6. Motion to strike claims for punitive damages – granted in part and denied in part. The phrase "2. For punitive damages;" is stricken from page 33 of Defendants' Answer, Affirmative Defenses, and Counterclaim.
7. Motion to strike claims for attorney's fees – granted. The phrase "3. For attorney's fees and the costs of defending against the Plaintiff's action and prosecuting the counterclaims;" is stricken from pages 33 and 36 of Defendants' Answer, Affirmative Defenses, and Counterclaim.

Edmund V. Ludwig, J.